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THE STATE OF TEXAS,

Petitioner,

[redacted]

GRADY LEE NELSON,

Respondent.

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Whether Tex. Penal Code Ann. § 42.09(a)(3), which penalizes such "physical mistreat[ment]" of "a national flag" as the actor "knows will seriously offend one or more persons likely to observe or discover his action," facially violates the First and Fourteenth Amendments to the United States Constitution.

2. Whether Tex. Penal Code Ann. § 42.09(a)(3), as applied to the peaceful burning of an American flag at an overtly political demonstration, an act of symbolic speech closely akin to pure speech, violates the First and Fourteenth Amendments to the United States Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-155

THE STATE OF TEXAS,

Petitioner,

—against—

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Introduction

The issue in this case is whether the State of Texas (hereinafter "Texas" or "the State") can inflict criminal penalties for the peaceful burning of a flag during a political demonstration, under a statute that proscribes such "physical mistreat[ment]" of the flag as "the actor knows will seriously offend one or more persons likely to discover his action." The Texas Court of Criminal Appeals, measuring its own state statute against the First and Fourteenth Amendments to the United States Constitution, held the statute unconstitutional as applied to Mr. John-

son's constitutionally protected expression. This Court should affirm.

Statement of Facts

On August 22, 1984, during the Republican National Convention in Dallas, Texas, a political demonstration entitled the "Republican War Chest Tour" culminated in the burning of a flag of the United States in front of Dallas City Hall. Respondent Gregory Lee Johnson was subsequently convicted under Texas Penal Code § 42.09(a)(3), which prohibits "Desecration of a Venerated Object." He was sentenced to one year in prison and a $2,000 fine. The statute under which Mr. Johnson was convicted classifies "a state or national flag" as a "venerated object," and defines "desecrate" as follows:

> 'desecrate' means deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

Tex. Penal Code Ann. § 42.09(b) (Vernon 1974).[1] Under the judge's instructions to the jury, Mr. Johnson could be convicted if he himself desecrated the flag, or if he "encourage[d]" another person to commit the offense.[2]

A. The Demonstration

The Republican War Chest Tour demonstration, which was authorized in advance by the Dallas Police, (R.II-71-72), was overtly political in character. Indeed, Texas concedes this. Pet. Br. i, 3 n.2; *see also* (R.II-160-61). Literature distributed during the demonstration explained that it was designed to protest the policies of the Reagan Administration and of certain American

1 Tex. Penal Code Ann. § 42.09(a)(3) incorporates this definition, and therefore the statute will be referred to hereinafter as § 42.09(a)(3).

2 The instruction, known as the "law of parties," provided that "a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." (R.I-49).

corporations located in Dallas, and included a list of fourteen political slogans to be chanted during the demonstration. Def. Exh. 1,2 (R.V-833-34). The slogans included: "Reagan, Mondale, which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "Red, white & blue we spit on you, You stand for plunder, you will go under." *Id.* Other chants and speeches criticized the C.I.A.'s role in Nicaragua, corporate investment in South Africa, and police brutality. (R.III-314,354). The demonstration was punctuated by "political theater," including several "die-ins" designed to dramatize the results of a nuclear war. (R.IV-423, III-258).

The demonstration marched through the streets of Dallas, stopping briefly at various corporate locations along the way. It culminated at Dallas City Hall, where the group burned a flag while chanting political slogans critical of the United States. (R.III-355, II-90-91). The Texas Court of Criminal Appeals noted that the burning was peaceful and led to no violence. (Pet. App. 3). After the flag was burned, the demonstration concluded. (R.III-322).

Texas has recounted in some detail its witnesses' version of the demonstration. Pet. Br. 2-6. Its brief recounts testimony alleging that, at various points in the demonstration prior to the flagburning, bank deposit slips were torn up, potted plants were uprooted, a flag was stolen, walls were spray-painted, and "obscenities" were directed at the United States and the Republican Party. *Id.* This testimony is irrelevant, however, for Mr. Johnson was neither prosecuted nor convicted for any such conduct.[3]

B. The Trial

Texas's attempt in its brief to taint Mr. Johnson by his association with the unproven acts of others is consistent with its

3 Indeed, Texas's own witnesses testified that, apart from his alleged role in the flagburning, Mr. Johnson neither engaged in nor encouraged others to engage in any activities beyond shouting so-called "obscenities" and knocking on glass doors. (R.II-44, 87, 155-57, 185).

tactics at trial. The prosecutor repeatedly referred to the shirt Mr. Johnson was wearing at trial, which featured the name of the Revolutionary Communist Youth Brigade (the youth group of the Revolutionary Communist Party), as if to suggest that Mr. Johnson's association with such a political group supported a finding of guilt. (R.III-327-28, IV-429) The prosecutor twice referred to Mr. Johnson's shirt in his closing argument, and condemned the organization as "a group of anarchists." (R.V-641,707).

The prosecutor also focused the jury's attention on the words the group chanted while the flag burned. He asked Police Officer Terri Stover whether "they ha[d] occasion to be saying anything at the time that [the flag] was burning?" (R.II-90). She replied that she recalled a rhyme, "America, the red, white, and blue, we spit on you," (R.II-91), and "Fuck America." (R.II-90). He asked Police Officer Roland Tucker the same question, again focusing on the chanting of "Red, white, and blue, we spit on you." (R.III- 215). Later, he noted that a demonstration leaflet containing that chant bore the initials of the Revolutionary Communist Youth Brigade, and asked whether that chant "encouraged disrespect for the flag." (R.IV-423-27).

Two police officers testified at trial that they had observed the flagburning, and that it had "seriously offended" them.[4] The prosecution offered no evidence, however, that Mr. Johnson knew that the flagburning was likely to seriously offend anyone.

Several legal observers trained by the American Civil Liberties Union who observed the demonstration testified that Mr.

4 Officer Stover testified that she was seriously offended because "I've seen a lot of bad things, but nothing that, I don't know, that shows quite that much respect being torn up like that." (R.II-91). Officer Tucker explained that he was seriously offended because "burning the flag shows disrespect for the country." (R.III-261). In addition, an Army Corps of Engineers employee, Daniel Walker, testified that the burning "deeply offended" him, again because it communicated a lack of respect for the flag. (R.III-272,276-80). No evidence was submitted that anyone other than these governmental employees was "seriously offended" by the flagburning.

Johnson did not burn the flag, but that they had seen another person commit the act. (R.III-320, IV-476-78). Mr. Johnson did not testify at trial, but his attorney introduced exhibits explaining the political nature of the demonstration, and witnesses for both the State and the defense agreed that the entire demonstration, including the flagburning, was explicitly political in character. (R.III-380-90, II-160).[5]

The prosecutor's closing argument began by condemning the group with which Mr. Johnson demonstrated as:

> some people who weren't local here, some people who came to protest what was going on and who I submit from the evidence, had different intentions than to make this city or this country sparkle.

(R.V-640). He then criticized the Revolutionary Communist Youth Brigade by name, (R.V-641), referred to Mr. Johnson's shirt bearing the Brigade's name, and repeated the testimony about the property destruction that occurred along the march (R.V-643-45), none of which Mr. Johnson was accused of. He concluded by stating:

> if you look at this evidence from start to finish, the participating in the beginning, the literature, the last notations [R.C.Y.B.], the shirt, who he is, the chanting, the yelling, the megaphone, the encouragement, the having the [mega]phone, being there, wanting this to happen, there is no question he encouraged it at all. He's guilty as sin as far as the law of parties is concerned.

(R.V-707-08).

The jury found Mr. Johnson guilty. A sentencing hearing was then held, at which Mr. Johnson testified at length. The

5 In addition, Mr. Johnson gave a summation to the jury, in which he made clear the political nature of the expression:

> The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a [juxtaposition]. We had new patriotism and no patriotism.

(R.V-656).

prosecutor, in his summation to the jury prior to sentencing, characterized Mr. Johnson as "the kind of man that believes in phrases such as—and I'm quoting—'Fuck America.' That's what he thinks of your country." (R.V-808). He argued that Mr. Johnson poses "a lot of danger for a lot of people by what he does and the way he thinks." (R.V-810).

The jury sentenced Mr. Johnson to one year in prison, and imposed a $2,000 fine. The Court of Appeals for the Fifth District of Texas at Dallas affirmed the conviction in an opinion by then-Judge John Vance, now counsel for Texas. *Johnson v. State*, 706 S.W.2d 120 (Tex. App.-Dallas 1986) (JA 18-27).[6]

C. The Decision of the Texas Court of Criminal Appeals

The Texas Court of Criminal Appeals[7] granted discretionary review of Mr. Johnson's conviction and reversed it, holding that Tex. Penal Code Ann. § 42.09(a)(3) was unconstitutional as applied to his activity. (Pet. App. 1-27).[8] The court first found that Mr. Johnson's acts constituted symbolic speech, because, in the context of "an organized demonstration, speeches, slogans, and the distribution of literature," it was clear that "by burning the flag, appellant 'intended to convey a particular message . . . and that this message was very likely to be understood by those who viewed it.' " (Pet. App. 8-10).

The court then examined the State's two asserted interests for the statute—preventing breaches of the peace and preserving

6 After the Texas Court of Criminal Appeals reversed Mr. Johnson's conviction on First Amendment grounds, the Attorney General declined to file a petition for certiorari. However, he permitted Mr. Vance, who had become the Dallas County Criminal District Attorney, to file such a petition, in effect to defend his own prior opinion. (Pet. Br. App. 1).

7 The Texas Court of Criminal Appeals is the State of Texas's highest court for criminal appeals. *See, e.g., City of Houston v. Hill*, 107 S. Ct. 2502, 2517 (1987) (Powell, J., concurring in part and dissenting in part).

8 The court addressed only Mr. Johnson's federal constitutional challenge, because it concluded that the lower appellate court had not addressed his claim that the statute and his conviction thereunder violated the Texas Constitution. (Pet. App. 7 n.6).

the flag as a symbol of national unity. With respect to the first, it construed the flag desecration statute as extending far beyond breaches of the peace:

> [S]ection 42.09(a)(3) is so broad that it may be used to punish protected conduct which has no propensity to result in breaches of the peace. 'Serious offense' does not always result in a breach of the peace . . . One cannot equate 'serious offense' with incitement to breach the peace.

(Pet. App. 13). The court also noted that the State had a less restrictive means for preventing breaches of the peace, for Tex. Penal Code Ann. § 42.01 directly addresses incitements to immediate breaches of the peace. (Pet. App. 14-16).[9] Therefore, the court held that, "as it relates to breaches of the peace, [§ 42.09(a)(3)] is too broad for First Amendment purposes." (Pet. App. 16).

With respect to the State's asserted interest in preserving the flag as a symbol of national unity, the court concluded that it is impermissible for the State to prescribe, through criminal legislation, a single meaning for the symbol of the flag:

> Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to present.

(Pet. App. 19-20).

9 Section 42.01 provides, in pertinent part:

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;
>
> (2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace.

Tex. Penal Code Ann. § 42.01 (Vernon 1974 and Supp. 1987), reproduced at Pet. App. 30.

This Court granted certiorari to review the Texas Court of Criminal Appeals' decision on October 17, 1988.

SUMMARY OF ARGUMENT

This case presents the question whether, consistent with the First and Fourteenth Amendments to the United States Constitution, a state can criminally convict a person of peacefully burning a flag in an overtly political demonstration, under a statute that hinges punishment on the act's communicative effect on third persons "likely to observe or discover" it.

Mr. Johnson maintains that Tex. Penal Code Ann. § 42.09(a)(3) is unconstitutional both on its face and as applied to the symbolic speech for which he was convicted. As this Court held forty-six years ago when confronted with another statutory regulation of respect for the flag, the dual principles of freedom of expression and government by the people prohibit the State from mandating respect for its icons by imprisoning those who express disrespect. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-42 (1943).

a. Section 42.09(a)(3) must be analyzed under the same First Amendment analysis applicable to "pure" speech, because it singles out conduct for punishment solely on the basis of its communicative effect, namely, that which "seriously offends." The less stringent test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), is inapplicable, because neither the statute nor the State's interests are "unrelated to expression."

b. Section 42.09(a)(3) is facially unconstitutional, first, because it imposes a viewpoint-based restriction on political expression. Texas explicitly asserts that its interest is to promote one view—that the flag is a symbol of nationhood and national unity. The First Amendment, however, mandates viewpoint-neutrality, and accordingly Texas may not "prescribe what is orthodox" concerning the flag's symbolic meaning by prohibiting private persons from using private flags to express opposing points of view. *Barnette*, 319 U.S. at 642.

c. However, as in its previous flag misuse and desecration cases, the Court may continue to reserve the question whether a state may proscribe flagburning *per se*. Because § 42.09(a)(3) singles out conduct that will "seriously offend one or more persons," the statute violates the First Amendment's prohibition on content-based discrimination, and its invalidation is compelled by this Court's recent decision in *Boos v. Barry*, 108 S. Ct. 1157 (1988). The First Amendment forbids the proscription of expression on the basis of the likely hostile reactions of an audience, and the asserted state interests—to preserve the flag as a symbol of nationhood and to prevent breaches of the peace—do not justify § 42.09(a)(3)'s infringement of First Amendment freedoms.

d. Third, and again whether or not a state may proscribe flagburning *per se*, § 42.09(a)(3) is unconstitutionally vague and overbroad. It is vague because it requires one who seeks to "physically mistreat" the flag to place himself or herself in the shoes of wholly unidentifiable third persons in order to gauge whether they will be "seriously" offended, an impossible inquiry. And because the First Amendment protects "seriously offen[sive]" expression, the statute's prohibition casts an impermissibly wide net over clearly protected First Amendment activity.

e. Even if the Court concludes that § 42.09(a)(3) survives a facial challenge, it must nonetheless affirm the Texas Court of Criminal Appeals' conclusion that it is unconstitutional as applied to Mr. Johnson. Mr. Johnson was convicted for peacefully burning a flag in an overtly political demonstration, clearly protected expression. Moreover, it appears that his conviction may have rested in part on his words and associations, and not solely on the flagburning.

The subject matter of this case—desecration of the national flag—stirs strong emotions precisely because of the flag's

unique symbolic power. But as this Court recognized in *Barnette*, 319 U.S. at 642, that fact only underscores the need for constitutional protection of this form of expression: "Freedom to differ is not limited to things that do not matter much. . . The test of its substance is the right to differ as to things that touch the heart of the existing order."

ARGUMENT

I. SECTION 42.09(a)(3) MUST SATISFY STRICT FIRST AMENDMENT SCRUTINY BECAUSE IT PROHIBITS CONDUCT SOLELY ON THE BASIS OF ITS COMMUNICATIVE IMPACT

Texas and amici devote considerable effort to arguing that a reduced standard of First Amendment scrutiny should be applied in this case because of the nature of Mr. Johnson's activity. Pet. Br. 12-19; Amici Br. of Washington Legal Foundation at 3-5, 17-23. This argument is misconceived. Where, as here, both the statute on its face and the State's interests are expressly directed not to a particular physical act, but to the act's communicative effect, traditional First Amendment scrutiny applies.

The statute under which Mr. Johnson was convicted, Tex. Penal Code Ann. § 42.09(a)(3), does not prohibit all flagburning or use, but only that which the "actor knows will seriously offend one or more persons likely to observe or discover his action." Thus, the statute singles out for prohibition only such conduct as will have a "seriously offen[sive]" communicative impact on others.

Because § 42.09(a)(3) conditions punishment solely on the conduct's communicative impact, its facial constitutionality can be resolved without categorizing the flagburning in this case as speech or conduct.[10] As then-Judge Scalia explained in his

10 Mr. Johnson vigorously maintains that the flagburning at issue in this case was protected symbolic expression, but that determination is necessary only for his "as applied" challenge. *See* Section III, *infra*.

dissent in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (1983) (en banc), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the critical inquiry is not whether a given action is conduct or speech, but whether the government's statute is directed at the action's communicative nature:

> freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.

703 F.2d at 622 (Scalia, J., dissenting) (original emphasis); *see also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497-98 (1975). The Court has consistently held violative of the First Amendment statutes "aimed precisely at the communicative effect of . . . conduct." 703 F.2d at 624 (citing cases). Section 42.09(a)(3) is such a statute, and is therefore subject to traditional First Amendment scrutiny.

For the same reason, the inquiry set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), does not apply. Where the government's interest is "directly related to expression . . . the four-step analysis of *United States v. O'Brien* is inapplicable." *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974); *Kime v. United States*, 459 U.S. 949, 952-53 (1982) (Brennan, J., dissenting from denial of certiorari); Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1484, 1496-97. Here, both the statute on its face and the government's asserted interests are directly related to the suppression of expression.[11]

11 The statute on its face proscribes only that conduct which communicates a message that "will seriously offend" others. The State's asserted interest in preserving the flag as a symbol of national unity is specifically aimed at the communicative effect of flag desecration, which the State asserts will undermine the State's exclusive symbolic

II. SECTION 42.09(a)(3) IS UNCONSTITUTIONAL ON ITS FACE

A. Section 42.09(a)(3) Punishes Speech Solely On The Basis Of Its Viewpoint

Section 42.09(a)(3) prohibits individuals from "mistreat-[ing]" any "state or national flag," whether privately or publicly owned.[12] Texas states that its interest in proscribing flag desecration is to promote its view that the flag is a "symbol of nationhood and national unity" deserving of great respect, and to forbid "mistreat[ment]" of the flag which challenges that view. Pet. Br. 19-24. On the face of the statute and that interest alone, § 42.09(a)(3) is unconstitutional.[13]

---

meaning for the flag. And the State's interest in preventing breaches of the peace is aimed at the allegedly provocative content of the message communicated. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 574-75 (11th Cir. 1984); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 53-57 (1973); Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1497.

In *O'Brien*, the Court found that Congress's interest in an efficient registration system was unrelated to the communicative nature of the act proscribed, draft-card burning. The Court expressly distinguished those situations, as here, where "the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *O'Brien*, 391 U.S. at 382; *see also Buckley v. Valeo*, 424 U.S. 1, 17 (1976); *Community for Creative Non-Violence v. Watt*, 703 F.2d at 625 (Scalia, J., dissenting).

12 The fact that the statutory prohibition extends even to use of a privately-owned flag obviously distinguishes this statute from one designed to proscribe "the act of burning a courthouse to protest a judicial decision, or the act of burning a ROTC building to protest the Vietnam War." Amicus Br. of Legal Affairs Council at 6.

13 The phenomenon of flag desecration statutes was unknown to the Framers. Great Britain has never enacted legislation prohibiting flag descration, and prior to 1896, no state legislation existed compelling respect or veneration for the American flag. D. Manwaring, *Render Unto Caeser: The Flag Salute Controversy* 2-3 (1962).

(*Footnote continued*)

The First Amendment requires the government to maintain strict viewpoint-neutrality. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Statutes designed to suppress expression on the basis of its viewpoint are therefore presumptively invalid:

> [T]here are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle . . . is that *the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.*

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (emphasis added).

Section 42.09(a)(3) impermissibly favors the State's viewpoint that the flag is a "symbol of nationhood and national unity" at the expense of all other views. Persons who believe that the flag symbolizes oppression or imperialism, and therefore deserves disrespect, are forbidden from expressing that viewpoint through physical "mistreat[ment]" of even privately-owned flags. Those who seek to celebrate the viewpoint sanctioned by the State, however, may burn the flag, so long as they do so ceremoniously.[14]

Indeed, the first American flag was designed, not as the quasi-sacred symbol of national unity that Texas describes, Pet. Br. 20-22, but merely as a protective signal that the four vessels of the infant American Navy were not pirate ships. B. Tuchman, *The First Salute* 48-49 (1988).

14 Texas's argument that persons can still express dissent through other means, Pet. Br. 42, is unavailing. First, " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the

Indeed, because the "proper" way to dispose of a flag is to burn it "in a dignified way," 36 U.S.C. § 176(k), all flag desecration statutes are likely to be at least implicitly viewpoint-based. Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1502-03, 1504 n.90. The State will not want to prohibit all burning of the flag, and thus must single out for prohibition only those acts of burning which are disrespectful, or contemptuous, or "seriously offen[sive]," *i.e.*, those that express an impermissible viewpoint.

From a First Amendment standpoint, § 42.09(a)(3) is indistinguishable from the viewpoint-based statute struck down in *Schacht v. United States*, 398 U.S. 58 (1970). That statute prohibited actors from wearing Army uniforms in any way that would "tend to discredit" the Army. The Court held the statute unconstitutional because under it an actor "was free to participate in any skit at the demonstration that praised the Army, but . . . could be convicted of a federal offense if his portrayal attacked the Army instead of praising it." 398 U.S. at 63. Similarly, here, Mr. Johnson presumably would have been free to burn the flag in a ceremonious fashion in order to demonstrate respect for the symbol, but was convicted because his alleged burning showed disrespect for the flag.

Texas's attempt to cast its statute in viewpoint-neutral terms only underscores the extent to which the statute and the State's underlying interests are viewpoint-based. It contends that it is not "prohibiting defiant or contemptuous opinions about the flag," but only protecting "the flag's physical integrity, so that it may serve as a symbol of nationhood and unity." Pet. Br.

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plea that it may be exercised in some other place.' " *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (*quoting Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). Second, this statute selectively relegates to "other means" only those who seek to express a viewpoint in opposition to the State's view of the flag.

29.[15] But § 42.09(a)(3) does not neutrally prohibit all destruction of the flag's physical integrity; it singles out only those acts which constitute "mistreat[ment]" *and* "will seriously offend one or more persons." Moreover, it makes no sense to assert that an interest in preserving the flag "as a symbol of nationhood and unity" is "not endorsing, protecting, avowing, or prohibiting any particular philosophy." Pet. Br. 29. Texas is protecting the philosophy that the flag symbolizes "nationhood and unity," and proscribing persons who seek to burn it or otherwise deface it precisely to question that for which it stands.

This Court's decisions regarding flag regulation make abundantly clear that the requirement of viewpoint-neutrality bars the government from utilizing criminal sanctions to compel respect for the flag. As far back as 1943, the Court held that compulsory flag salutes violate the First Amendment. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. Justice Jackson, writing for the Court, recognized that the flag plays a patriotic role, but held that under the First Amendment, patriotism cannot be compelled. 319 U.S. at 641. The First Amendment was designed to forestall the dangers that result when government abandons viewpoint-neutrality and attempts to coerce respect by forbidding dissent:

> Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard . . . the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

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15 *See also* Amicus Br. of Legal Affairs Council 16-17 ("the justification for the statute clearly and plainly has nothing to do with the content of speech. The obvious justification is to prevent destruction or defacement of objects that the people of Texas have decided should not be destroyed or defaced."); Amici Br. of Washington Legal Foundation 3-4 ("the statute merely proscribes certain destructive and damaging conduct, regardless of whether the desecrator intended thereby to convey any message, political or otherwise").

319 U.S. at 640-41.[16]

Twenty-six years later, in *Street v. New York*, 394 U.S. 576 (1969),[17] the Court relied on *Barnette* to hold that the State violates the mandate of viewpoint-neutrality when it criminalizes contemptuous speech about the flag in order to preserve respect for the flag as the national symbol:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'

16 A vivid example confirming Justice Jackson's warning is reflected in the history of Germany's flag desecration statutes. The rise of Naziism coincided with increasingly broad prohibitions against desecration of state symbols. The Kaiser's flag desecration statute provided:

> Anyone who maliciously removes, destroys, injures or commits insulting mischief on a public emblem of the authority of the Empire, or of a federal sovereign, or an emblem of the majesty of a federal state, shall be punished by a fine up to 600 Shillings, or by imprisonment with labour up to two years.

G. Drage, *Criminal Code of the German Empire*, § 135 (Novella of 1876) at 223 (1885).

In 1932, the statute was amended to provide:

> Whoever publicly profanes the Reich or one of the states incorporated into it, its constitution, colors or flag or the German armed forces, or maliciously and with premeditation exposes them to contempt, shall be punished by imprisonment.

(December 19, 1932, RGB 1-I, 548) reproduced in United States War Dept. Pamphlet No. 31-122, *Statutory Criminal Law of Germany*, § 134a, at 95 (August 1946).

In 1935, Adolf Hitler broadened the German statute as follows:

> Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards and banners, its insignia or decorations or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment.

(June 28, 1935) reproduced in United States War Dept. Pamphlet No. 31-122, *supra*, at 96.

17 Mr. Street was convicted for publicly burning an American flag while proclaiming, "If they let that happen to [civil rights activist James] Meredith, we don't need an American flag." 394 U.S. at 590.

394 U.S. at 593 (*quoting Barnette*, 319 U.S. at 642). In *Spence v. Washington*, 418 U.S. at 412-13,[18] the Court applied the same reasoning to a statute penalizing *nonverbal* "improper use" of the flag.

Thus, whether one is compelled to respect a flag by saluting it or by observing a series of taboos concerning its use or misuse, the compulsion is viewpoint-based, and is presumptively unconstitutional in a society which declares itself dedicated to political toleration.

B. The "Seriously Offend" Clause Of Section 42.09(a)(3) Proscribes Expression Solely On The Basis Of Its Communicative Content, And The State's Asserted Interests Do Not Justify Its Infringement Of Expression

Even if the Court does not find § 42.09(a)(3) viewpoint-based, it must nonetheless find it unconstitutionally content-based, for the statute's "seriously offend" clause hinges punishment on the intended communicative impact of an individual's act. This content-based restriction is not justified by the asserted state interests.

1. The "Seriously Offend" Clause Of Section 42.09(a)(3) Is Content-Based

Section 42.09(a)(3) provides that defacing, damaging, or physically mistreating the flag will be punished only where the communicative content of the action is such that the actor knows will "seriously offend" others. Whether or not the act is proscribed thus turns on the effect its message has on third parties. *See* Section I, *supra*.

The First Amendment prohibits such content-based prohibitions. *Boos v. Barry*, 108 S. Ct. 1157, 1163 (1988); *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 537 (1980). In *Boos*, the Court struck down a statute barring the "display [of] any sign within 500 feet of a

18 Mr. Spence was convicted for displaying a flag with a peace symbol attached to it, in opposition to the United States' invasion of Cambodia. 418 U.S. at 406-08.

foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.' " 108 S. Ct. at 1160. The Court found the statute "content-based," and therefore subject to the strictest First Amendment scrutiny, because it focused "on the direct impact of speech on its audience." 108 S. Ct. at 1163-64; *id.* at 1171 (Brennan, J., concurring in part and concurring in the judgment). Like the statute in *Boos*, the "seriously offend" clause in § 42.09(a)(3) premises punishment not on any particular physical act, but only on those physical acts that have a particular "direct impact . . . on [the] audience," namely, those that "will seriously offend" others.

Assuming *arguendo* that this provision draws any definable line, *see* Section II.C., *infra*, it is one this Court has consistently held unconstitutional, for it effectively creates a "heckler's veto." "The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. at 592. This is because a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). In order to ensure that the dispute-inviting function of expression is not impaired, even "seriously offen[sive]" speech is protected.[19]

Thus, the Court has routinely struck down statutes that punish speech or other expressive activity based solely on the likely effect the activity will have on listeners. In *Terminiello*, it struck down a "breach of the peace" ordinance which punished speech that "stirs the public to anger, invites dispute, brings

19 As the Court noted in *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978):

> the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

about a condition of unrest, or creates a disturbance." 337 U.S. at 4.[20]

Both the majority and the principal dissent in *Spence v. State of Washington*, 418 U.S. 405, agreed that punishing flag misuse because of its communicative impact on others is invalid. The majority flatly rejected the State's justification that it "desired to protect the sensibilities of passersby." 418 U.S. at 412; *see also id.* at 415-16 (Douglas, J., concurring). And even those who voted in dissent to uphold the Washington statute did so because in their view the statute's "operation does not depend upon whether the flag is used for communicative or noncommunicative purposes . . . or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message." *Id.* at 422-23 (Rehnquist, J., dissenting). Here, the statute's operation depends precisely upon whether the communicative purpose and effect of the act will be to seriously offend a "segment of the State's citizenry," and thus § 42.09(a)(3) fails scrutiny under both the majority and the dissenting analysis in *Spence*.[21]

20 *Accord, Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms"); *Bachellar v. Maryland*, 397 U.S. 564 (1970) (unanimously reversing conviction for demonstration protesting Vietnam War where disorderly conduct statute permitted conviction for "the doing or saying or both of that which offends, disturbs or tends to incite a number of people gathered in the same area"); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (holding facially unconstitutional "breach of peace" statute that defined breach of peace as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"); *cf. Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988) ("an 'outrageousness' standard . . . runs afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience").

21 Chief Justice Rehnquist and Justice White expressed the same concern in *Smith v. Goguen*, 415 U.S. 566 (1974), in which the majority invalidated a Massachusetts flag desecration statute as impermissibly vague. Justice White concurred on the ground that the statute made

2. The State's Interests Do Not Justify § 42.09(a)(3)'s Content-Based Infringement On Free Expression

Because § 42.09(a)(3) on its face draws impermissible content-based lines, the State must demonstrate that it is "necessary to serve a compelling state interest and [ ] is narrowly drawn to achieve that end." *Boos v. Barry*, 108 S. Ct. at 1164; *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1728 (1987).[22] Texas asserts two state interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. Pet. Br. 19-30, 31-37. As the Texas Court of Criminal Appeals correctly held, neither can justify § 42.09(a)(3).

a. Preserving The Flag As A Symbol of National Unity Is An Impermissible Justification For A Restriction On Expression

Texas's principal justification for § 42.09(a)(3)—to preserve the flag as a "symbol of nationhood and national unity"—is not a compelling state interest. Indeed, it is precisely this interest in "prescribing what shall be orthodox" that renders the statute impermissibly viewpoint-based in the first place. *See* Section II.A, *supra*.

The Court has held that a state interest in preserving "respect for our national symbol" is insufficient to justify punishing contemptuous *words* directed at the flag. *Street*, 394 U.S. at 593. Because § 42.09(a)(3) is directed at communicative impact and therefore must be scrutinized under the same standard as a proscription on "pure" speech, this rationale must be rejected here as well.[23] It is inimical to First Amendment principles to claim that in order to preserve a symbol of "national unity," the government must be permitted to suppress citizens' use of that symbol to express dissent. Commitment to a symbol cannot justify political repression.

Moreover, even if the interest in preserving the flag as a symbol of national unity were a compelling state interest, Texas has made no showing that this interest is actually endangered by flagburning. People choose to burn the flag to express dissent precisely because it is such a powerful symbol. And because the flag is "not merely cloth dyed red, white, and blue," *Smith v. Goguen*, 415 U.S. at 603 (Rehnquist, J., dissenting), the burning of one or more physical representations of it cannot obliterate its metaphorical value as a symbol. There is simply no showing that flagburning threatens the flag's symbolic meaning. "[U]ndifferentiated fear . . . is not enough to overcome

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"the communicative aspect of the proscribed conduct . . . a crucial element of the violation," and inflicted "punish[ment] for communicating ideas about the flag unacceptable to the controlling majority in the legislature." 415 U.S. at 588 and n.3. Section 42.09(a)(3) goes even further, for it punishes action if it communicates ideas unacceptable not just to the "controlling majority," but to *any* onlooker or discoverer of the action.

Chief Justice Rehnquist, in dissent, agreed in principle with Justice White's approach:

> the question remains whether the State has sought only to punish those who impair the flag's physical integrity for the purpose of disparaging it as a symbol, while permitting impairment of its physical integrity by those who do not seek to disparage it as a symbol. *If that were the case . . . such a law would abridge the right of free expression.*"

Id. at 597-98 (Rehnquist, J., dissenting) (emphasis added).

22 If the Court finds the statute viewpoint-based, vague or overbroad, it need not address the State's interests at all, for no compelling state interest justifies such statutes. *See, e.g., Taxpayers for Vincent*, 466 U.S. at 804; *City of Houston v. Hill*, 107 S. Ct. 2502 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983).

23 *See* Section I *supra*. Professor Nimmer's general critique of flag desecration statutes is particularly applicable to § 42.09(a)(3), given its explicit reliance on communicative impact:

> The Court in *Street* expressly held that 'respect for our national symbol' is not an interest which may be protected against *words* that deprecate such respect. If the only governmental interest at stake is the prohibition of communications that deprecate respect for the flag, then it can make no difference that the message of deprecation is expressed by symbolic acts rather than words. In either event the governmental interest is not, in the *O'Brien* phrase, an 'interest unrelated to the supression of free expression,' and hence must succumb to the First Amendment.

Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. at 57 (original emphasis).

the right to freedom of expression." *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, 508 (1969).[24]

Thus, the Texas Court of Criminal Appeals correctly held that the State may not suppress the expression of flagburning in the interest of preserving a symbol of national unity. (Pet. App. 18- 21); *see also Kime*, 459 U.S. at 952-53 (Brennan, J., dissenting from denial of certiorari); *Monroe v. State Court of Fulton County*, 739 F.2d at 574-75.

b. Section 42.09(a)(3) Is Not Narrowly Tailored To The State's Asserted Interest In Preventing Breaches Of The Peace

Texas's second asserted state interest is in preventing breaches of the peace. Pet. Br. 31. But the Texas Court of Criminal Appeals has authoritatively construed § 42.09(a)(3) to extend far beyond acts likely to incite breaches of the peace:

> Section 42.09(a)(3) is so broad that it may be used to punish protected conduct which has no propensity to result in breaches of the peace. 'Serious offense' does not always result in a breach of the peace. . . . One cannot equate 'serious offense' with incitement to breach the peace.

(Pet. App. 13). This interpretation by Texas's highest court for criminal appeals of a Texas criminal statute is binding on this

24 Because § 42.09(a)(3) is facially directed not at preserving the flag's symbolic meaning but at "seriously offend[ing]" onlookers, the statute is both underinclusive and overinclusive with respect to this asserted state interest. The statute does not prohibit all flag "mistreatment," no matter how much it might threaten the flag's symbolic value, but only those acts that "will seriously offend" onlookers. And conversely, the statute proscribes all acts of flag "mistreatment" that "will seriously offend" onlookers, whether or not they threaten the flag's symbolic value.

Texas's suggestion that the proscription of flag desecration is necessary to ensure that the flag remains a usable symbol for all ideas, Pet. Br. 28-30, is both disingenuous and unsupported by the record. Texas's brief makes absolutely clear that its interest is not in protecting all ideas, but in protecting the specific idea that the flag is a "symbol of nationhood and national unity." Pet. Br. 19, 20-24.

Court. *See, e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875). In light of that construction, the Court cannot find that § 42.09(a)(3) is narrowly tailored to prevent breaches of the peace. This Court has repeatedly struck down similarly broad statutes allegedly directed at preventing breaches of the peace. *Cohen v. California*, 403 U.S. 15 (1971); *Bachellar*, 397 U.S. at 566-67; *Terminiello*, 337 U.S. at 4.[25]

The Texas Court of Criminal Appeals also noted that Texas has another statute directly addressed to words and conduct that tend to incite an immediate breach of the peace, Tex. Penal Code Ann. § 42.01.[26] As this Court stated in *Boos v. Barry*, the existence of another statute more narrowly tailored to the asserted state interest supports the conclusion that the challenged statute is not narrowly tailored and cannot withstand First Amendment scrutiny. 108 S. Ct. at 1166-67.

25 Texas argues that the Texas Court of Criminal Appeals held it to too strict a standard "[b]y requiring *actual* as opposed to potential violence before a prosecution for desecration of the flag may be initiated." Pet. Br. 36. This grossly misstates the Court of Criminal Appeals' analysis. The court merely noted the absence of any breach of the peace in this case as evidence disproving the claim that flag desecration will *inherently* cause a breach of the peace. Pet. App. 13. Indeed, the fact that there have been many cases of flag misuse and desecration without a breach of the peace conclusively defeats a claim that the act will inevitably or "inherently" cause a breach of peace. *See, e.g., Spence*, 418 U.S. at 409; *Street*, 394 U.S. at 592; *Monroe v. State Court of Fulton County*, 739 F.2d at 575; *Jones v. Wade*, 479 F.2d 1176, 1180 (5th Cir. 1973).

The Court has consistently rejected bare claims that particular expressive conduct is "inherently" likely to cause disruption, and has insisted on an evidentiary showing that the fear is well founded. *See Cohen v. California*, 403 U.S. at 22 (rejecting as "plainly untenable" the claim that the word "Fuck" could be proscribed on the theory that "its use is inherently likely to cause violent reaction"); *Tinker*, 393 U.S. at 508.

26 *See* note 9 *supra*. In striking down a Houston ordinance as unconstitutionally overbroad, this Court pointed to Tex. Penal Code Ann. § 42.01, noting that it is "designed to track the 'fighting words' exception set forth in *Chaplinsky v. New Hampshire*." *City of Houston v. Hill*, 107 S. Ct. at 2510 n.10.

C. Section 42.09(a)(3) Is Unconstitutionally Vague And Overbroad

Whether or not Texas may constitutionally place viewpoint- and content-based restrictions upon the use and display of private person's flags, it certainly may not do so in the hopelessly vague and overbroad terms that this statute uses. The Court has held that statutes impinging upon areas protected by the First Amendment must be drawn with narrowness and precision. *See, e.g., City of Houston v. Hill*, 107 S. Ct. at 2508; *Kolender v. Lawson*, 461 U.S. 352; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Section 42.09(a)(3) fails on both counts.

1. Section 42.09(a)(3) Is Impermissibly Vague

Section 42.09(a)(3) fails to draw a comprehensible line between those acts of flagburning it prohibits and those it permits, and is therefore unconstitutionally vague on its face.[27] *Smith v. Goguen*, 415 U.S. at 574. The statute proscribes only those acts of flagburning or misuse which "the actor knows will seriously offend one or more persons likely to observe or discover his action." This renders § 42.09(a)(3) perfectly vague, because what will "seriously offend" another is as unknowable as what will "annoy" another. *Coates v. Cincinnati*, 402 U.S. 611.

A statute is impermissibly vague if it " 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Goguen*, 415 U.S. at 572 n.8 (*quoting Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). The vagueness doctrine applies with special force in the First Amendment context. *Goguen*, 415 U.S. at 572-73;

27 Mr. Johnson maintains that because of the inherent subjectiveness of the standard punishing only those actions which will "seriously offend one or more persons likely to observe or discover [the] action," the statute is vague on its face, *i.e.*, "every application [ ] create[s] an impermissible risk of suppression of ideas." *New York State Club Assn. v. City of New York*, 108 S. Ct. 2225, 2233 (1988). If Mr. Johnson is correct on his facial claim, the statute is by definition vague as applied to him as well.

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

Section 42.09(a)(3) is vague in several significant respects. First, it requires an individual to predict the reactions of unknown and unknowable third parties. He must foresee what will "seriously offend" not merely all potential passers-by, but also all who might "discover" his action later through word of mouth, the news media, or a photograph. In *Coates*, this Court held that a law that turns on the reactions of onlookers is inherently vague. *Coates*, 402 U.S. at 611-14 (ordinance proscribing "conduct in a manner annoying to persons passing by" is perfectly vague, because "no standard of conduct is specified at all"). Section 42.09(a)(3)'s focus on "serious offense" to others is at least as standardless as the ordinance struck down in *Coates*.

Second, the statute draws an unintelligible distinction between actions which will merely offend the unidentifiable third parties, which are permissible, and actions which will "seriously offend" them, which are criminal. The trial in this matter illustrates the impossibility of distinguishing permissible offense from punishable "serious" offense. Virtually all the witnesses at trial testified that the flagburning "offended" them, but only two police officers, sent by the State to observe the demonstration, said that it "seriously offended" them. (R.II-91, III-220).[28] The legal observers at the demonstration testified that the action offended them, but not seriously, because they believed that everyone has a right to express themselves by using the flag in the way they deem appropriate. (R.III-330-32, IV-483-84). Thus, in this case it appears that in order to determine whether flagburning would have seriously offended an onlooker, one would have had to ascertain of those who might be offended whether they valued more highly unmitigated respect for the flag as a symbol of national unity, or the principle of free expression.

28 The fact that the only persons who were actually "seriously offended" were state agents underscores the extent to which this statute operates to promote the State's viewpoint.

In *Goguen*, the Court held impermissibly vague a statute that prohibited "contemptuous" treatment of the flag, because " '[w]hat is contemptuous to one man may be a work of art to another.' " *Id.* at 573 (*quoting* Note, *Freedom of Speech—Desecration of National Symbols As Protected Political Expression*, 66 Mich. L. Rev. 1040, 1056 (1968)). The same rationale requires invalidation of § 42.09(a)(3), because what "seriously offend[s]" one person may be an important statement of political expression to another. Like the "outrageousness" standard this Court unanimously struck down last term in *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. at 882, a "seriously offend" standard permits biased enforcement, because it "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[29]

This Court has recognized that the American flag holds radically different meanings for different people: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Barnette*, 319 U.S. at 632-33. Whether one is "seriously offended" by the burning of our flag, then, is likely to turn on the flag's particular meaning for that person, and will often turn on one's view of the United States, or one's political assessment of the country's policies at a given time.[30]

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29 The statute is not saved by the fact that it includes a requirement that the individual "know" his conduct "will seriously offend" others. The Court rejected precisely that argument in *Goguen*, noting that restricting the scope of the statute to "intentional contempt" for the flag "does not clarify what conduct constitutes contempt, whether intentional or inadvertent." 415 U.S. at 580. Similarly, this statute does not, and indeed cannot, clarify what conduct "will seriously offend" others.

30 The "seriously offend" clause is so vague that burning the flag ceremoniously in order to dispose of it might even violate it, if a Jehovah's Witness or a vigorous opponent of U.S. policies were likely to observe or discover the act. A Jehovah's Witness might be seriously offend-

Third, the statute's prohibition of "physical mistreat[ment]" is also impermissibly vague. It provides no guidance as to what constitutes "mistreat[ment]" of the flag. A Boy Scout or war veteran will no doubt define "mistreat" very differently from a member of the Revolutionary Communist Youth Brigade. If one agrees with the State that the flag deserves deep respect because it symbolizes the nation, mistreatment would be any conduct that demonstrates a lack of respect. If one believes that the flag is not deserving of such respect, for religious or political reasons, any action that shows respect would constitute mistreatment. Indeed, a Republican might deem use of the flag as part of a Democratic campaign banner "mistreatment," and vice versa.[31]

Thus, as in *Goguen*, the Court need not decide whether the government may ever proscribe flagburning, but only that it is impermissible to define criminal conduct by such vague standards as whether unidentifiable third parties are likely to be "seriously offend[ed]," or whether the flag has been "physically mistreat[ed]."[32]

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ed by such quasi-religious treatment accorded to a secular object. Critics of U.S. policies might also be "seriously offended" by ceremonious destruction of the flag, just as many people would be "seriously offended" by dignified treatment accorded a swastika, the national symbol of Nazi Germany. At various times in this country's history, Native Americans, Blacks, women denied the right to vote, religious persons forced to salute the flag, filmmakers blacklisted as Communists, citizens of Japanese ancestry detained during World War II, and others victimized by the United States government might well have considered any respectful treatment of the flag "seriously offen[sive]."

31 Even the term "national flag" is vague, for it does not indicate which nation's flags are covered, nor which representations of flags are covered. *See, e.g., Smith v. Goguen*, 415 U.S. at 758-79 and n.24.

32 Texas's suggestion that the "seriously offend" clause is severable and that this matter should be remanded to the Texas Court of Criminal Appeals to consider a "saving construction" is frivolous. As this Court held unanimously in *Bachellar v. Maryland*, 397 U.S. at 570, even when the unconstitutional portion of a statute is severable, if the verdict does not specify its limitation to the non-problematic section, the conviction must be reversed.

2. Section 42.09(a)(3) Is Substantially Overbroad

In addition to being void for vagueness, § 42.09(a)(3) is substantially overbroad. *City of Houston v. Hill*, 107 S. Ct. at 2508.[33] By penalizing all "mistreat[ment]" of the flag that "will seriously offend" another person, it prohibits a substantial amount of clearly protected First Amendment activity.

Section 42.09(a)(3) prohibits all "physical mistreat[ment]" of a flag which could conceivably seriously offend someone. If one took one's guidance concerning mistreatment from the rules for proper treatment of the flag set out in 36 U.S.C. §§ 174-77, Texas's statute would proscribe all of the following acts:

(1) displaying the flag in "inclement weather," or after sunset without "proper illuminat[ion]";

(2) hoisting the flag slowly rather than "briskly";

(3) *not* displaying the flag on "Mothers Day" or "Navy Day";

(4) flying a flag from any part of an automobile other than "the chassis" or "the right fender";

(5) displaying the flag at a level lower than the flag of the United Nations or any other national or international flag;

(6) displaying the flag to the right of a speaker;

(7) displaying the flag over the middle of an east-west street without placing the union to the north;

(8) allowing the flag to touch the ground;

(9) carrying the flag horizontally, rather than "aloft and free";

(10) wearing the flag;

33 The statute's vagueness greatly exacerbates its overbreadth, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494 n.6, but Mr. Johnson contends that even if the Court finds the statutory terms clear they are overbroad.

(11) affixing a flag patch to the uniform of any organization other than a "patriotic organization";

(12) not standing at attention with the right hand over the heart whenever the flag passes in a parade.

See 36 U.S.C. § 174-77. Moreover, as noted above, virtually any conduct regarding the flag has the potential of "seriously offend(ing)" someone. Thus, § 42.09(a)(3) proscribes an almost infinite range of protected activity.

Section 42.09(a)(3)'s substantial overbreadth is further illustrated by comparing its broad prohibitions to the only two categories of expression which the Court permits the State to prohibit on the basis of its effect on others: speech that is intended and likely to produce imminent lawless action, and "fighting words." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Cohen v. California*, 403 U.S. at 20.

In *Brandenburg*, the Court narrowly limited the scope of speech which may be proscribed in order to prevent incitement of law violations to expression that is both "directed to inciting or producing imminent lawless action" *and* "likely to incite or produce such action." 395 U.S. at 447. Statutes that do not draw that narrow line, like § 42.09(a)(3), are facially unconstitutional. *Id.*

Nor is Texas's statute directed to prohibit "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court's decision in *Street* compels this conclusion, for that case held that the statement "we don't need no damn flag," made *while* burning an American flag, was not so "inherently inflammatory" as to come within the class of "fighting words." *Street*, 394 U.S. at 592; *see also Cohen v. California*, 403 U.S. at 20-21 ("fighting words" doctrine applies only where speech is directed at a particular individual and is so "personally abusive" that it is "inherently likely to provoke violent reaction"); *City of Houston v. Hill*, 107 S. Ct. at 2510 (same).

Thus, § 42.09(a)(3) is substantially overbroad for much the same reason that it is impermissibly vague: it seeks to punish

expression that "seriously offends" others, and this Court has held that such speech is protected.

III. SECTION 42.09(a)(3) IS UNCONSTITUTIONAL AS APPLIED TO THE FLAGBURNING AT ISSUE IN THIS CASE

If the Court concludes that § 42.09(a)(3) is not unconstitutional on its face, it should nonetheless uphold the Texas Court of Criminal Appeals' decision that the statute is unconstitutional as applied in this case. This conclusion is required because: (1) the peaceful burning of a flag at the culmination of a political demonstration is protected symbolic speech; and (2) Mr. Johnson may have been convicted for his words and affiliations.

A. The Flagburning At Issue In This Case Was Symbolic Speech

Every judge to address whether the flagburning in this case was symbolic speech has concluded that it was, including even those who voted to uphold Mr. Johnson's conviction. *See* Pet. App. 8-10 (Texas Court of Criminal Appeals majority opinion); Pet. App. 25 (dissenting opinion); *Johnson v. State*, 706 S.W.2d at 123 (opinion of then-Judge Vance). According to then-Judge Vance, the State itself did not dispute that Mr. Johnson's conduct was symbolic speech at the Dallas County appeal level. 706 S.W.2d at 123.

The State now *asserts* that Mr. Johnson's alleged activity was not symbolic speech, but fails to offer any rationale to support is assertion.[34] Instead, the State argues that the statute satisfies

34 Texas does assert, in its summary of argument, that "an act of flagburning does not constitute 'speech' entitled to First Amendment protection because the conduct involved is essential neither to the exposition of any idea nor to the peaceful expression of an opinion." Pet. Br. at 9. But it never pursues this line of argument, nor suggests where it finds support in First Amendment precedent or principle. Neither the wearing of armbands in *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, nor the affixing of a peace sign to a flag in *Spence v. Washington*, 418 U.S. 405, nor the display of a flag in *Stromberg v. California*, 283 U.S. 359 (1931), were found to be "essential" to express the idea or opinion they expressed, yet all were deemed protected symbolic speech. To suggest that the State may proscribe all forms of expression not deemed "essential to the exposition of any idea" is contrary to the entire history of the First Amendment. It is "the usual rule that governmental bodies may not prescribe the *form* or content of individual expression." *Cohen v. California*, 403 U.S. at 24 (emphasis added).

the test for regulation of symbolic speech set out in *United States v. O'Brien*. Pet. Br. 10-11. Amici similarly do not offer any rationale for concluding that Mr. Johnson's alleged conduct did not constitute symbolic speech, and instead argue that the state's regulation was directed at the flagburning's conduct element, not the speech element. Amici Br. of Washington Legal Foundation 3-5. But as commentators have unanimously noted, the distinction between the conduct element and the speech element of expressive conduct is a futile one.[35]

The test this Court has adopted does not attempt to distinguish between speech and conduct *per se*, but simply asks whether, in context, the conduct involved was communicative in intent and effect. *Spence*, 418 U.S. at 410-11. Where there is "[a]n intent to convey a particularized message . . . and the likelihood was great that the message would be understood by those who viewed it," the conduct is symbolic speech. *Id.* The flagburning in this case came at the culmination of an overtly political demonstration, in the midst of the Republican National Convention, in front of Dallas City Hall, as demon-

35 *See* Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1494-96; L. Tribe, *American Constitutional Law* 827 (2d ed. 1988); Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 79-80 (1968); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. at 33 ("Any attempt to disentangle 'speech' from conduct which is itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser (and also no greater) degree of protection than that accorded to so-called pure speech.").

strators chanted political slogans condemning the United States. The Texas Court of Criminal Appeals correctly decided that in "the context of an organized demonstration, speeches, slogans, and the distribution of literature," the flagburning was intended and understood as an act of symbolic expression. (Pet. App. 8-10).

Because the flag carries such a powerful symbolic meaning, almost any conduct with regard to it is communicative:

> [W]hen the object is a pure symbol, such as the flag . . . any individualized activity with regard to it outside of the purely logistical activity of maintaining it or storing of it is bound to convey a message of fealty or revulsion and 'is closely akin to pure speech.'

Goguen v. Smith, 471 F.2d 88, 99 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974).[36] Moreover, precisely because its message is nonverbal, the symbolism of flagburning cuts across language barriers to reach the international community abroad, the foreign-language speaking community here, and even the illiterate. In the age of broadcast media, sound bites, and instantly-transmitted television images, flagburning, no less than the sit-ins of the civil rights movement, provides a powerful medium for the message of dissent from government policies or disrespect for the government itself.[37] For these reasons, this Court has frequently recognized that the absence of words in no way diminishes the First Amendment protection accorded to political expression. *See, e.g., Tinker v. Des Moines School District*, 393 U.S. 503 (wearing of black armbands to protest

36 *See also* M. Talocci, *Guide to the Flags of the World* 7-8 (rev. ed. 1977) ("the more the symbolism of flags and the way they are put to use are studied, the clearer it becomes that they are in fact a system of communication . . . a flag is a statement made in nonverbal terms which—if read properly—can tell us a great deal about the bearer.")

37 The important symbolism of flag misuse and burning is demonstrated by the flag cases themselves. Mr. Spense hung his flag to protest the invasion of Cambodia and the killing of students at Kent State, Mr. Street burned the flag in response to the shooting of civil rights worker James Meredith, and Ms. Monroe did so to express opposition to the United States' support of the Shah of Iran.

Vietnam War); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in to protest segregation); *Stromberg v. California*, 283 U.S. 359 (flying of red flag to symbolize opposition to organized government).

Once conduct is determined to be symbolic expression, the Court must determine whether "the governmental interest [in regulating it] is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. As we have shown above, where the government's interest is related to the suppression of free expression, as it is here, the *O'Brien* analysis is inapplicable, and traditional strict First Amendment scrutiny is mandated. *See* Section I, *supra*. Under such scrutiny, Texas has failed to advance any compelling state interest sufficient to justify the infringement of Mr. Johnson's protected expression. *See* Section II.B.2, *supra*.

B. Mr. Johnson May Have Been Convicted For His Speech And Affiliations

As in *Street*, this case poses the real possibility that Mr. Johnson was punished, not for flagburning, but for his words and associations. *Street*, 394 U.S. 576. The Court in *Street*, after undertaking the independent examination of the record required in all cases raising the possibility of punishment for First Amendment activity, 394 U.S. at 589, concluded that the jury might have relied in part upon Mr. Street's words while burning the flag to convict him, and therefore reversed the conviction. 394 U.S. at 590.

In this case, the jury was instructed, over defense counsel's objection, that it could convict Mr. Johnson if it concluded *either* that he burned the flag himself, or that he "encouraged" the flagburning. (R.I-49). No First Amendment limiting instruction was given. The prosecution's closing is replete with references to protected speech and associations, and expressly relied on the "encouragement" theory for a finding of guilt:

> if you look at this evidence from start to finish, the participating in the beginning, the literature, the last notations [R.C.Y.B.], the shirt, who he is, the chanting, the yelling,

> the megaphone, the encouragement, the having the [mega]phone, being there, wanting this to happen, there is no question he encouraged it at all. He's guilty as sin as far as the law of parties is concerned.

(R.V-707-08). In addition, the prosecutor focused repeatedly on Mr. Johnson's affiliation with the Revolutionary Communist Youth Brigade and on the fact that while the flag burned, the group chanted "Red, white, and blue, we spit on you." *See* Statement of Facts, *supra*.

While § 42.09(a)(3) on its face does not include punishment for mere words, unlike the statute in *Street*, its proscription does turn on "serious offense," which may arise at least in part from the words spoken while the act is being committed, and certainly arose in this case precisely because of the message conveyed. *See* note 4 *supra*. Moreover, when the statute is read together with the "law of parties" jury instruction and the prosecutor's focus at trial and in closing argument on Mr. Johnson's chanting, speechmaking, and affiliations, the possibility that he was convicted for his words and associations cannot be discounted.[38] Accordingly, as in *Street*, the conviction must be overturned.

38 This possibility is underscored by the fact that in its deliberations the jury specifically requested to review "testimony regarding the defendant's use of the megaphone." (R.I-53).

CONCLUSION

For all the above reasons, the decision of the Texas Court of Criminal Appeals should be affirmed.[39]

Respectfully submitted,

WILLIAM M. KUNSTLER
(Counsel of Record)
13 Gay Street
New York, New York 10014
(212) 924-5661

DAVID D. COLE
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway—7th Floor
New York, New York 10012
(212) 614-6464

Of Counsel:

MARTHA CONRAD
180 North La Salle
Chicago, Illinois 60601
(312) 609-0007

39 If the Court reverses, it should remand to the Texas Court of Criminal Appeals for determination of Mr. Johnson's remaining challenges to the conviction.